164 (1)

Supreme Court, U.S.
FILED

No. 09-1573 JUN 10 2010

IN THE OFFICE OF THE CLERK

Supreme Court of the United States

ELEANOR CAPOGROSSO, PETITIONER,

v.

THE SUPREME COURT OF THE
STATE OF NEW JERSEY ET AL.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ELEANOR CAPOGROSSO
pro se

122 East 42nd Street
Suite 1616
New York, NY 10168
(212)509-7700
eleanor@capogrosso.com

CURRY & TAYLOR ♦ 202-393-4141

QUESTIONS PRESENTED

Does the dismissal of petitioner's complaint seeking to hold the State of New Jersey accountable for failing to discipline the misconduct of its judges deny her due process?

PARTIES TO THE PROCEEDING

Eleanor Capogrosso, *Petitioner*,

The Supreme Court of the State of New Jersey; Hon. Stuart Rabner, in his official capacity as the Chief Judge of the Supreme Court of the State of New Jersey; the Advisory Committee on Judicial Conduct for the State of New Jersey; Candace Moody, Esq., in her official capacity as the Disciplinary Counsel for the Advisory Committee on Judicial Conduct for the State of New Jersey; John Tonelli, in his official capacity as the Director of the of the Advisory Committee on Judicial Conduct for the State of New Jersey; Hon. Maurice J. Gallipoli, a Superior Court Judge in Hudson County for the State of New Jersey; Hon. Barbara A. Curran, a Superior Court Judge in Hudson County for the State of New Jersey; Hon. Peter F. Bariso, a Superior Court Judge in Hudson County for the State of New Jersey; and Hon. Mahlon L. Fast, a Superior Court Judge in Hudson County for the State of New Jersey, *Respondents*.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT PROVISIONS INVOLVED 2

STATEMENT 8

REASONS FOR GRANTING THE PETITION 17

CONCLUSION 31

APPENDIX

Circuit Court Decision 1a
District Court Opinion & Order 10a
Order Denying Rehearing 24a

TABLE OF AUTHORITIES

Page

CASES

ASHCROFT V. IQBAL ET AL., 556 U.S. ___(2009) 15, 22
BELL V. ATLANTIC CORP. V. TWOMBLY, 550 U.S. 544, 555 (2007) 15, 22
BRADLEY V. FISHER, 80 U.S. 355, 357(1871) 18
BRISCOE V. LAHUE, 460 U.S. 325, 341 N.26(1983) 18, 19
CONLEY V. GIBSON, 355 U.S. 41, 45-46(1957) 15
CRAWFORD-EL V. BRITTON, 523 U.S. 574, 598(1998) 25
DENNIS V. HIGGINS, 498 U.S. 439, 445(1991) 18
EDELMAN V. JORDAN, 415 U.S. 651, 663(1974) 17
EMERY V. AMERICAN GENERAL FIN., INC., 134 F.3D 1321, 1323(7TH CIR. 1938) 24
EX PARTE YOUNG, 209 U.S. 123, 160(1908) 17
EXXON MOBIL CORP. V. SAUDI BASIC INDUSTRIES CORP., 544 U.S. 280(2005) 20
FORRESTER V. WHITE, 484 U.S. 219, 229(1988) 18, 19
LANCE V. DENNIS, 546 U.S. 459(2006) 21
LUJAN V. DEFENDERS OF WILDLIFE, 504 U.S. 555, 560-561(1992) 19
MARBURY V. MADISON, 5 U.S. (1 CRANCH) 137, 177(1803) 17
MCCULLOCH V. MARYLAND, 17 U.S. 316, 436(1819) 17
MIRELES V. WACO, 502 U.S. 9, 11-12(1991) 18, 19
MITCHUM V. FOSTER, 407 U.S. 225, 238-239 (1972) 18
MONROE V. PAPE, 365 U.S. 167, 180(1961) 18
QUERN V. JORDAN, 440 U.S. 332, 337(1979) 17
SCREWS V. UNITED STATES, 325 U.S. 91, 107 108(1945) 18
STUMP V. SPARKMAN, 435 U.S. 349, 356-357(1978) 18
UNITED STATES V. CLASSIC, 313 U.S. 299, 326 (1941) 18

STATUTES

28 U.S.C. § 1254(1) 2
28 U.S.C. § 2101(e) 2

28 U.S.C. § 1738 ..... 20, 21
42 U.S.C. § 1983 ..... 11, 17
N.J.S.A.2B:2A-10 5

RULES

Fed. R. Civ. P. 1 4
Fed. R. Civ. P. 8(a)(1) 4
Fed. R. Civ. P. 12(b)(6) 5, 12, 15, 16
Fed. R. Civ. P. 12(c) 25
Supreme Court Rule 13.3 2

I

OPINIONS BELOW

The published opinion of the Court of Appeals for the Third Circuit in *Eleanor Capogrosso v. The Supreme Court of the State of New Jersey et al.*, C.A. No. 08-3816, filed November 27, 2009, and reported at 588 F.3d 180(3rd Cir. 2009), affirming the district court's dismissal of petitioner's amended complaint, is set forth in the Appendix hereto(App.1-9).

The unpublished opinion and order of the U.S. District Court for the District of New Jersey, Hochberg, J., in *Eleanor Capogrosso v. The Supreme Court of the State of New Jersey et al.*, C.A. No. 07-5579(FSH), filed August 6, 2008, and reported at 2008 U.S. Dist. LEXIS 60717, dismissing petitioner's amended complaint, is set forth in the Appendix hereto(App. 10-23).

The unpublished Order of the Court of Appeals for the Third Circuit in *Eleanor Capogrosso v. The Supreme Court of the State of New Jersey et al.*, C.A. No. 08-3816, filed March 12, 2010, denying petitioner's petition for rehearing or for rehearing *en banc*, is set forth in the Appendix hereto(App. 24-25).

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit affirming the district court's dismissal of petitioner's amended complaint, was entered on November 27, 2009(App. 1-9). Its further Order denying petitioner's timely filed petition for panel rehearing or for rehearing *en banc* was filed and decided on March 12, 2010(App. 24-25).

This petition for writ of certiorari is filed within ninety (90) days of the date the court of appeals denied petitioner's timely filed petition for rehearing or for rehearing *en banc*. 28 U.S.C. § 2101(c). Supreme Court Rule 13.3. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment I:

> Congress shall make no law...abridging the freedom of speech.

United States Constitution, Amendment V:

> No person...shall be deprived of life, liberty, or property, without due process of law....

United States Constitution, Amendment VII:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

United States Constitution, Amendment XI:

> The Judicial power of the United States shall not be construed to extend to any suit in law or in equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

United States Constitution, Amendment XIV, § 1:

> ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law....

28 U.S.C. § 1331:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § § 1343(a)(3) & (4):

> (a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
> ...
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

Civil Rights Act 42 U.S.C. § 1983:

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

Fed. R. Civ. P. 1:

> [The federal rules of civil procedure] ...shall be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.

Fed. R. Civ. P. 8(a)(1) & (2):

> **(a) Claims for relief.** A pleading that states a claim for relief must contain:
> (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;
> (2) a short and plain statement of the claim showing that the pleader is entitled to relief....

Fed. R. Civ. P. 12(b)(6):

> ...[T]he following defenses may at the option of the pleader be made by motion:...(6) failure to state a claim upon which relief can be granted....

Article 6, § 6, ¶ 3 of the New Jersey Constitution:

> The Supreme Court shall make rules governing the administration of all courts in the State and, subject to the law, the practice and procedure in all such courts.

New Jersey Rules of Court 2:15:

> To implement N.J.S.A.2B:2A-10, prior to suspension prior to hearing, and to assist otherwise in fulfilling the administrative responsibilities of the court, the Court establishes a committee of this Court to be known as Advisory Committee on Judicial Conduct.

New Jersey Rules of Court 2:15-10:

> On completion of its preliminary investigation, the Committee may:
> (a) if it finds that the allegations are without merit, dismiss them and so inform the person who brought the allegations before the Committee, as well as the judge if the Committee so desires.

STATEMENT

Between 2003 and 2007, petitioner Eleanor Capogrosso("petitioner"), an attorney duly licensed to practice law in the State of New York, was a litigant in several different civil actions in the Superior Court for Hudson County, New Jersey, where she resides. In the first case, a personal injury action brought against her landlord, respondent Hon. Maurice J. Gallipoli ("Gallipoli"), a Superior Court Judge in Hudson County, allowed petitioner's retained counsel to withdraw on the eve of trial, overruling two prior orders by another Superior Court Judge prohibiting it from doing so.

In the process of making this ruling on November 29, 2006, Gallipoli disparaged petitioner in open court, denied petitioner the opportunity to file responsive documents, ignored documents which were filed in opposition even though he stated for the record that he had considered those documents, and threatened petitioner with jail if she persisted in asserting her due process right to file opposing documents to her counsel's motion to withdraw.

On December 30, 2006, petitioner filed a complaint against Gallipoli with respondent Advisory Committee of Judicial Conduct ("ACJC") for the State of New Jersey, alleging that his conduct constituted a disqualifying bias against her, violating the Code of Judicial Conduct, specifically, Canon 1 (a judge should observe high standards of conduct so that the integrity and independence of the judiciary is preserved); Canon 2A (a judge should respect and comply with the law and act at all times in a manner that promotes public confidence in the integrity and impartiality of the

judiciary); Canon 3A(1) (a judge should be faithful to the law); Canon 3A(3) (a judge should be patient, dignified and courteous); and Canon 3A(6) (a judge should accord every person legally interested in a proceeding or that person's lawyer, full right to be heard according to law).

On May 22, 2007, ACJC through its Disciplinary Counsel, respondent Candace Moody, Esq.("Moody"), and its Director, respondent John Tonelli("Tonelli"), wrote petitioner that it was dismissing her complaint and refusing to bring formal disciplinary proceedings against Gallipoli, finding "no basis for a charge of improper judicial conduct...."

In a second civil action brought against petitioner by her landlord in Superior Court in Hudson County for alleged defamation stemming from the landlord's violation of various building regulations, respondent Gallipoli coerced petitioner's counsel to abandon his representation of petitioner by falsely telling her counsel that she "has been through a number of counsel....at least two that I can recall and probably more." In fact, petitioner had only *one* prior counsel.

Nevertheless, Gallipoli's coercive statements caused counsel to abandon his representation of petitioner. Without counsel, petitioner was defaulted and judgment was entered against her for monetary damages. Upon petitioner's appeal, the Appellate Division reversed the decision, finding the landlord's defamation case against petitioner to be without merit. Petitioner filed a complaint against Gallipoli with the ACJC stemming from these facts. It nevertheless again

dismissed petitioner's complaint and refused to bring formal disciplinary proceedings against Gallipoli.

In a third civil action in Superior Court, a Special Civil Part lawsuit brought by petitioner, respondent Hon. Barbara A. Curran("Curran"), a Superior Court Judge in Hudson County, allowed the defendants' counsel, an attorney of the defendant law firm not licensed to practice in the State of New Jersey, to appear in her court without a motion *pro hac vice*, over petitioner's objection. Even though defendants' counsel was engaged in the unauthorized practice of law, a criminal offense of disorderly conduct in the State of New Jersey, Curran allowed the representation and ruled that she would consider granting attorney's fees to the defendants.

Petitioner filed a complaint against Curran with respondent ACJC for violating Canons 2A and 3A(1). However, the ACJC through respondents Moody and Tonelli dismissed petitioner's complaint stating that "[u]nder New Jersey Court Rule 6:11, an attorney, even though not admitted in New Jersey, is permitted to represent his or her law firm in the Special Civil Part, as was done here." However, Rule 6:11 applies only to small claims cases and petitioner's civil action against defendant was *not* a small claims civil action.

In a fourth civil action, petitioner's landlord filed a nonpayment action against petitioner when she withheld rent because of a lack of heat in her apartment. Because of prior instances of bias and partiality against her in Hudson County by the Judges of the Superior Court, petitioner moved for a change of venue. Curran denied the motion and ordered that

petitioner pay rent without an abatement hearing. As a result, petitioner was required to pay her landlord $9,335.00 without being provided an abatement hearing, her day in court.

In a fifth civil action brought by petitioner in Superior Court in Hudson County, after the defendant moved for summary judgment, respondent Hon. Peter F. Bariso("Bariso"), a Superior Court Judge, telephoned counsel for both petitioner and defendant and warned petitioner's counsel that there would be sanctions if there were an opposition to the defendant's summary judgment motion. Petitioner's counsel did not file any opposition papers because of Bariso's threat to sanction him. Subsequently, Bariso dismissed petitioner's complaint, marking it unopposed.

Believing that Bariso had extorted her attorney so that there was no opposition to the defendant's motion for summary judgment, leading to the dismissal of her complaint, petitioner filed a complaint against Bariso with respondent ACJC for violating Canons 1, 2A, 3A(1), 3A(3) and 3A(6) of the Code of Judicial Conduct. The ACJC, however, through respondents Moody and Tonelli, dismissed petitioner's disciplinary complaint on May 14, 2007.

In 2005, petitioner withheld her rent because of a lack of heat in her apartment. When the landlord brought a civil action against her for nonpayment of rent in the Superior Court in Hudson County, petitioner defended contending *inter alia* that her apartment was not habitable, retaining an expert who evaluated the heat problem and recommended remedial measures. However, instead of addressing her

habitability claims----ones clearly within the jurisdiction of the Superior Court----respondent Hon. Mahlon L. Fast("Fast"), a Superior Court Judge in Hudson County, ordered petitioner to pay rent together with the landlord's attorney's fees, referring petitioner's habitability claims to the Jersey City Municipal Court.

Petitioner's filed a complaint against Fast with respondent ACJC for violating the Canons of the Code of Judicial Conduct arising from this conduct. The ACJC, however, through respondents Moody and Tonelli, dismissed petitioner's disciplinary complaint on April 30, 2007.

Another dispute erupted in April of 2007 between petitioner and her landlord concerning the landlord's failure to remediate mold in petitioner's apartment in the wake of a flood caused by a broken pipe. Because the property was insured by the Department of Housing and Urban Development and its regulations controlled the inspections of these apartments, petitioner brought a civil action in the federal district court against HUD and the landlord for damages and oversight in the cleanup and remediation of mold in her apartment.

The landlord brought its own suit for nonpayment of rent in the Hudson County Superior Court and petitioner defended on the ground that her apartment was uninhabitable. During the course of the State court proceedings, Fast adjourned the case to consider the preemption issue, stating that he wanted no memos from the parties. The landlord nevertheless submitted a memo to Fast on the preemption issue by

the time the court had reconvened and when petitioner objected, Fast held up his "chrono card" which stated that "memo was ordered." Argument ensued on the preemption issue with petitioner's counsel being placed at a disadvantage by the surprise change by Fast in his ruling.

Finally, in January of 2008, petitioner and her attorney appeared in Superior Court in Hudson County before Judge Alavaro Inglesias for an order to show cause to gain possession of petitioner's apartment within the statutory 10-day time period after the landlord's lock-out, a routine procedure. Fast saw them in the courthouse and conferred with Judge Inglesias' in his chambers before the hearing. Inglesias thereafter denied petitioner a show cause order and ruled that petitioner must proceed by way of a formal motion, an impossible option since petitioner would have been brought outside the statutory 10-day time period when such a motion must have been commenced. In this scenario, Fast interfered with petitioner's right to have a fair hearing on her show cause order and influenced Judge Inglesias to deny her relief. Moreover, as a result of this ruling, petitioner lost possession of her apartment.

By November of 2007, petitioner appearing *pro se* had brought this civil rights action under 42 U.S.C. § 1983, in the federal district court for the District of New Jersey against these four Superior Court Judges as well as the ACJC, its Director and Disciplinary Counsel and the State judicial machinery in general seeking declaratory relief, damages, costs and attorney's fees(App. 2-3;10-11). In an amended twenty-two-count complaint reflecting all of the

aforementioned facts, petitioner claimed that each respondent Judge of the Superior Court in Hudson County (Gallipoli, Curran, Bariso and Fast, JJ.) had committed misconduct in her state court cases, some of which amounted to criminal behavior, denying petitioner her due process rights as a litigant under the Fourteenth Amendment and § 1983(App. 10-11).

Petitioner further claimed that the ACJC, charged under the New Jersey Rules of Court with investigating claims of judicial misconduct, had itself committed misconduct when it dismissed her complaints brought against these judges(App. 3;11). Petitioner alleged that the ACJC's actions in these matters violated her rights under the Fourteenth Amendment and § 1983(App.3;11).

Finally, petitioner claimed that New Jersey Court Rule 2:15, which established the ACJC, violates the New Jersey Constitution because it provides no intelligible standard or principle by which the ACJC ascertains the validity of complaints brought against judicial officials; it fails to provide for any appeals process; and its opaque provisions shroud the deliberative process under a veil of secrecy which enables capricious and *ad hoc* decisionmaking, warranting public disclosure of the entire process(App. 3;11)

Respondents filed a motion to dismiss petitioner's complaint under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted(App. 2;10-11). The district court, Hochberg, J., granted the motion on August 6, 2008, in an unpublished opinion(App. 10-23). It first ruled that

petitioner's claims against the four judges for misconduct on account of their alleged criminal conduct were barred by the doctrine of judicial immunity(App. 12-13). As it determined, "[j]udges acting in their judicial capacity are absolutely immune from suit in their individual and official capacities"(App. 12).

As for petitioner's claims under the due process clause of the Fourteenth Amendment and § 1983 against the ACJC, Moody in her official capacity and Tonelli in his official capacity, the district judge ruled that the ACJC and its members are entitled to immunity under the Eleventh Amendment "[b]ecause the ACJC is a committee of the Supreme Court, [and] the State of New Jersey would be responsible for any damage award against the ACJC"(App. 12).

Nor did the motion judge think that petitioner's conclusory allegations that Fast sought to influence Judge Inglesias' subsequent unfavorable decision against petitioner stated a claim for relief under § 1983, because they describe no more than an otherwise innocuous meeting between colleagues and because Inglesias' judicial conduct would be immune from liability in any event(App. 16-18).

Finally, the district court rejected petitioner's facial challenge to New Jersey Court Rule 2:15 (App. 18-19). To the extent that her claim was bottomed on § 1983, it did not allege a deprivation of a right, privilege or immunity secured by the law or the federal constitution, as required by the statute (App. 18-19). Even if petitioner's claim were one brought under the due process clause of the Fourteenth Amendment, the district judge concluded that her allegations failed to

describe how the delegation of administrative responsibilities to the ACJC for judicial misconduct violates her federal constitutional rights; instead, they alleged only a general disagreement with the outcome of the complaints she brought to that body(App. 22-23). It denied petitioner's motion for reconsideration on November 17, 2008(App. 4).

On November 27, 2009, the court of appeals in a *per curiam* opinion affirmed the district court's dismissal of petitioner's complaint(App. 1-9). It ruled that the doctrine of judicial immunity shielded from liability under § 1983 the four respondent Judges of the Superior Court in Hudson County since petitioner "has not set forth any facts that would show that any of the judges acted in the absence of jurisdiction" and because individual citizens do not have a constitutional right to the prosecution of alleged criminals(App. 4-5). Nor was there any discernible factual basis in petitioner's allegations to state a claim of a "judicial conspiracy" arising from respondent Fast's interference with and improper influence of Judge Inglesias' adverse determination of petitioner's show cause order (App. 5-6).

It also agreed with the district court that Eleventh Amendment immunity bars relief arising from petitioner's claims against ACJC and its members sued in their official capacities under § 1983 (App. 6-7). The court of appeals finally rejected petitioner's facial challenge to New Jersey Court Rule 2:15 for the same reasons as the district court(App. 8-9).

On March 12, 2010, the court of appeals denied petitioner's timely filed petition for rehearing or for rehearing *en banc*(App. 24-25).

REASONS FOR GRANTING THE PETITION

I. The Dismissal of Petitioner's Complaint Seeking To Hold the State of New Jersey Accountable For Failing To Discipline the Misconduct of Its Judges Denied Her Due Process And A Fair Hearing On Her Claims.

A. The Immunity Provided The State By The Eleventh Amendment And The Doctrine of Judicial Immunity Does Not Justify Dismissal of Petitioner's Complaint.

In *Ashcroft v. Iqbal et al.*, 556 U.S. __ (2009) and *Bell v. Atlantic Corp. v. Twombly*, 550 U.S. 544, 555;570(2007), this Court reinterpreted the standards of *Conley v. Gibson*, 355 U.S. 41, 45-46(1957) for assessing a complaint when subject to dismissal under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted. To survive such a motion now, the complaint's *factual*—not legal---allegations are taken as true; and if the complaint as read contains sufficient factual matter to state a claim for relief that is plausible on its face, allowing the court to draw the reasonable inference that the defendant is liable for the misconduct alleged, dismissal is not warranted. *Iqbal*, 556 U.S. at ___. *Twombly*, 550 U.S. at 556-557;570. In the event a complaint is deemed deficient under this new standard, *Iqbal* provides that the preferred practice is to allow the plaintiff the opportunity to

amend her complaint to conform to these new requirements. *Id.* at ___.

Petitioner's allegations in her complaint do not consist of naked legal conclusions; they contain facts which are inconsistent with legal conduct. Consonant with *Twombly* and *Iqbal*, petitioner has alleged facts in her complaint which, if taken as true, describe illegal conduct by respondents and she has stated grounds for relief that are plausible. Petitioner alleged that the ACJC is the disciplinary agency constitutionally charged with the responsibility to review and investigate complaints of judicial misconduct in the New Jersey State courts and to enforce the obligations of judges there to observe high standards of behavior consistent with the Code of Judicial Conduct.

However, as petitioner alleged, New Jersey Court Rule 2:15, which established the ACJC, violates the New Jersey Constitution by endowing the ACJC with unbridled discretion to determine which allegations of a complaint against judicial officers are without merit and to dismiss complaints against judges for any reason or for nor reason at all. It also fails to provide any intelligible principles or standards for the ACJC to ascertain the validity of complaints brought against judicial officials; it fails to provide for an appeals process; and it allows the ACJC to deliberate in secret and to engage in capricious, *ad hoc* decisionmaking. Because New Jersey Court Rule 2:15 together with New Jersey Rule of Court 2:15-10 grants a constitutional obligation to an organization not subject to any review or oversight, petitioner claims that these Rules deny her due process and access to a process which should be public in all respects.

Petitioner seeks to hold accountable the State of New Jersey and its administrative and judicial arms for the injuries to her *federal* constitutional rights which they've inflicted upon her by failing to supervise its judiciary and by enforcing arbitrary mechanisms for resolving grievances against judges. Specifically, she seeks to have declared unconstitutional New Jersey Court Rule 2:15 and to enjoin its enforcement because this "remedy" provides no transparency, no meaningful review process and denies petitioner due process of law in violation of the Fourteenth Amendment.

Enjoining prospectively the operation of New Jersey Court Rule 2:15 as repugnant to the federal constitution is not barred by the State's sovereign immunity under the Eleventh Amendment. Such a remedy against the State and the relevant State actors for conduct in contravention of the federal constitution is entirely consistent with our federal structure; and the idea that States, regardless of their sovereignty, can act in derogation of its own citizens' *federal* constitutional rights and can avoid prospective injunctive relief from such conduct has been consistently repudiated by this Court. *Quern v. Jordan*, 440 U.S. 332, 337(1979). *Edelman v. Jordan*, 415 U.S. 651, 663(1974). *Ex parte Young*, 209 U.S. 123, 160(1908).

Any other result violates the Supremacy Clause and runs afoul of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177(1803); *McCulloch v. Maryland*, 17 U.S. 316, 436(1819); and *Ex parte Young*, *supra*. It also ignores the thrust of 42 U.S.C. § 1983, and the distinct federal remedy it has historically provided citizens harmed by State actors who deprive citizens of their federal constitutional rights. *Dennis v. Higgins*, 498

U.S. 439, 445(1991). *Mitchum v. Foster*, 407 U.S. 225, 238-239 (1972). *Monroe v. Pape*, 365 U.S. 167, 180(1961). *United States v. Classic*, 313 U.S. 299, 326 (1941). See *Screws v. United States*, 325 U.S. 91, 107-108(1945).

Nor is judicial immunity a valid defense to petitioner's claim that the judicial respondents here engaged in bias, prejudgment and partiality, some of which amounted to criminal conduct, e.g., conspiracy to obstruct justice, perjury and extortion, in an attempt to deprive petitioner of her rights under the Fourteenth Amendment in retaliation for petitioner's litigious reputation or for retaining different counsel over time. Judicial immunity is overcome when suit is brought for acts which are not judicial or adjudicative in nature, *Forrester v. White*, 484 U.S. 219, 229(1988), or when they are carried out in the absence of any jurisdiction to do so. *Mireles v. Waco*, 502 U.S. 9, 11-12(1991), *Stump v. Sparkman*, 435 U.S. 349, 356-357(1978). See *Briscoe v. LaHue*, 460 U.S. 325, 341 n.26(1983).The judicial misconduct----including criminal acts----here alleged describe behavior which is entirely non-judicial in character and in the clear absence of any jurisdiction whatsoever to carry out these illegal actions. *Stump v. Sparkman, supra. Bradley v. Fisher*, 80 U.S. 355, 357(1871).

Respondent Gallipoli, for example, lacked all authority to reconsider and overrule two prior orders of another Superior Court Judge on the same matter; his ruling exceeded his constitutional and statutory powers. Nor are judges who engage in criminal acts---- even when carrying out their nominally "official" duties-----possessed of the constitutional or statutory power to do so; those criminal acts are profoundly non-

judicial in nature and do not carry with them an immunity from liability. *Forrester v. White, supra.* In fact, as the Court has made clear in *Briscoe v. LaHue, supra,* the commission of criminal acts is, by its very nature, functionally *extra-judicial* in character.

Respondent Gallipoli's alleged falsifying of an order, respondent Curran's enabling of disorderly conduct, respondent Bariso's extortion and respondent Fast's conspiracy are all acts which are extra-judicial in character, do not invoke the clothing of judicial immunity and make each of them liable to petitioner for damages under § 1983 to the extent that their illegal conduct denied petitioner due process, equal access to the courts and fundamental fairness. *Mireles v. Waco, supra. Forrester v. White, supra.*

Moreover, petitioner is *not* seeking to compel the enforcement of state criminal laws in federal court, as the district judge surmised. Instead, by alleging that the respondent State court judges in Hudson County have in the course of denying her a fair hearing on her claims committed criminal acts, petitioner has sought to establish her standing to seek relief under § 1983 for this ongoing constitutional injury. Petitioner's further allegations that respondents failed or refused to investigate this misconduct by the four State court judges here----some of which amounts to criminal conduct----allegedly causing her constitutional injury in the form of a denial of due process, is the allegation of (a) an "injury in fact,"(b) causally connected to the alleged conduct or inaction of the State actors which (c) will be redressed by a favorable decision, all within the requirements of *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561(1992).

Nor is the *Rooker-Feldman* Doctrine applicable to petitioner's allegations, as respondents argued below. In a unanimous opinion in *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280(2005), the Court sought to simplify the reach of the *Rooker-Feldman* doctrine and to rein in any expansive views of the doctrine which have led lower federal courts to refuse to hear cases which legitimately invoked their federal jurisdiction. The Court held that "[t]he *Rooker-Feldman* doctrine...is confined to...cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Id.* at 283-284. *Exxon Mobil* involved parallel state and federal litigation and the Court held that *Rooker-Feldman* is not triggered simply by the entry of a judgment in state court. *Id.* at 292-293. Disposition of the federal claim, once the state-court adjudication is complete, would be governed by regular preclusion law consistent with the Full Faith and Credit Act, 28 U.S.C. § 1738. *Id.*

However, where there is no final state court judgment which a federal court is being asked to review, the *Exxon Mobil* Court stated that

> [§] 1257 [does not] stop a district court from exercising subject-matter jurisdiction....If a federal plaintiff "present[s] some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party..., then there is jurisdiction....

Id. at 293. See also *Lance v. Dennis*, 546 U.S. 459(2006) *passim*. Moreover, after *Mobil Exxon*, without a *final* state court judgment, *Rooker-Feldman* does not apply in any event. See *Federacion de Maestros de Puerto Rico v. Junta de Relaciones del Trabajo de Puerto Rico*, 410 F.3rd 17, 23-25(1st Cir. 2005)("finality" under *Rooker-Feldman* analyzed).

Here petitioner has not "lost" in state court and she is not a "state court loser;" her § 1983 claims have *never* been brought or litigated in state court and this is the first time petitioner has brought these claims against these respondents. Petitioner is *not* asking the federal court to review any state-court judgment; her facial constitutional challenge to New Jersey Court Rule 2:15 under § 1983 is new, has never been adjudicated in any court and remains unaddressed and undecided by any court, state or federal. Nor are petitioner's claims"inextricably intertwined" with the merits of any state court litigation and does not invoke the facts of any prior state court suit. Finally, there was no opportunity for petitioner to litigate her claims in state court because the decisions of the ACJC challenged here were unappealable and could not be reviewed in state court in any event. For these reasons, the *Rooker-Feldman* doctrine cannot justify the dismissal of petitioner's complaint.

Consistent with *Twombly*, petitioner has alleged facts which plausibly show that her federal rights under the constitution were violated by the gross misconduct of the respondent State court judges on serial occasions and by the unfair enforcement of New Jersey Court Rule 2:15 by respondent ACJC and its members. At the very least, even if petitioner's complaint were

deemed deficient under the new standards of *Twombly*, petitioner should have been afforded the opportunity to amend her complaint to replead her factual allegations to conform to these new requirements. *Iqbal*, 556 U.S. at __ .

The court of appeals as well as the district court were therefore wrong to rely upon the Eleventh Amendment or the doctrine of judicial immunity to justify dismissal of petitioner's amended complaint.

E. Petitioner's Claim of a "Judicial Conspiracy" Against Her Should Survive A Motion To Dismiss.

Under *Twombly*, "a claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at ___, citing *Twombly*, 550 U.S. at 556. She need only plead "more than a sheer possibility that a defendant has acted unlawfully" and "a court must accept as true all of the allegations contained in a complaint" with the proviso that a plaintiff need only "state a plausible claim for relief to survive a motion to dismiss."*Id.*

Petitioner met this new standard in her amended complaint alleging a judicial conspiracy between respondent Fast and Judge Inglesias to deny her due process and a fair hearing on her show cause order, ultimately resulting in the loss of her apartment. She alleged that in January of 2008, petitioner and her attorney appeared in Superior Court in Hudson County before Judge Inglesias for an order to show cause so

that she could gain possession of petitioner's apartment within the statutory 10-day time period after the landlord's lock-out. Fast saw them in the courthouse and conferred with Judge Inglesias' in his chambers before the hearing.

Inglesias immediately thereafter denied petitioner a show cause order, a routine procedure, and ruled that petitioner must proceed by way of a formal motion, an impossible option since petitioner would have been brought outside the statutory 10-day time period when such a motion must have been brought. Proceeding by motion rather than by an order to show cause is against case law, court rule and the notices which are mailed to the tenant by the court with the nonpayment complaint. The parties *must* proceed by an order to show cause to request that the judgment for possession be reversed and the complaint for nonpayment be dismissed.

Requiring her to proceed by motion, as petitioner alleged, denied her access to the courts. Fast interfered with petitioner's right to have a fair hearing on her show cause order and influenced Judge Inglesias to deny her relief. As a result of this ruling by Judge Inglesias, as influenced by Fast, petitioner lost possession of her apartment. These allegations were sufficient under *Twombly* and *Iqbal* to make out a plausible claim of a judicial conspiracy to deny petitioner her due process rights and they should have survived respondents' motion to dismiss.

Direct evidence of a conspiracy, judicial or otherwise, is rarely available and the pleader of such allegations should not be held to an impossible standard

of clarity when most of the facts central to her claim are solely within the knowledge of Judges Fast and Inglesias, facts which will not become available until discovery. To require more precision in petitioner's pleading in her amended complaint is inconsistent not only with the spirit of *Twombly* and *Iqbal* but also with venerated notions of fundamental fairness ans access to the courts.

Requiring a plaintiff to adduce secreted facts in her initial pleading in order to avoid dismissal is an intolerable burden on access to justice. In *Emery v. American General Fin., Inc.*, 134 F.3d 1321, 1323(7th Cir. 1998), the court stated that imposing such a requirement on a plaintiff would "create a Catch-22 situation in which a complaint is dismissed because of the plaintiff's inability to obtain essential information without pretrial discovery (normally of the defendant, because the essential information is in his possession and he will not reveal it voluntarily) that she could not conduct before filing the complaint."*Id.*

Given respondent Fast's preexisting animus and bias against petitioner as alleged in the amended complaint, the circumstances surrounding the conversation between Judges Fast and Inglesias in chambers prior to Judge Inglesias' ruling lend themselves plausibly to the inference that their cloistered conversation concerned petitioner and that it was not favorable to her. Moreover, the plausible inference from the fact that their conversation immediately preceded Judge Inglesias' unfavorable ruling against petitioner on the show cause order lends itself to the inference that this conversation influenced the unfavorable ruling.

To the extent that some elements of petitioner's allegations in this regard are "conclusory," the remedy of a more definite statement provided by Fed. R. Civ. P. 12(e) is more appropriate than outright dismissal, together with this Court's suggestion in *Crawford-El v. Britton*, 523 U.S. 574, 598(1998), of "carefully limited and tightly controlled discovery by the Plaintiff as to certain officials." Because of petitioner's history with respondent Fast and the timing of events as alleged in the amended complaint, there is a well-founded, plausible basis for her allegations of a judicial conspiracy within the meaning of *Twombly* and *Iqbal* and petitioner deserves not outright dismissal of her amended complaint but discovery on this claim.

CONCLUSION

For all the reasons identified herein, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Third Circuit and, ultimately, to vacate and reverse the dismissal of petitioner's amended complaint and remand the matter to the United States District Court for the District of New Jersey for further proceedings including discovery and trial, or provide petitioner with such other relief as is fair and just in the circumstances of this case.

Respectfully submitted,

Eleanor Capogrosso, *Pro se*
122 East 42nd Street, Suite 1616
New York, NY 10168
(212)509-7700

(Any footnotes trail end of each document)

No. 08-3816

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ELEANOR CAPOGROSSO, Appellant

v.

THE SUPREME COURT OF THE STATE OF NEW JERSEY; STUART RABNER (INTENDED TO BE THE CHIEF JUDGE OF THE SUPREME COURT OF NEW JERSEY); ADVISORY COMMITTEE ON JUDICIAL CONDUCT; CANDACE MOODY (INTENDED TO BE THE DISCIPLINARY COUNSEL FOR THE ADVISORY COMMITTEE ON JUDICIAL CONDUCT); JOHN TONELLI (INTENDED TO BE THE DIRECTOR OF THE ADVISORY COMMITTEE ON JUDICIAL CONDUCT); HON. MAURICE J. GALLIPOLI, J.S.C.; HON. PETER F. BARISO, J.S.C.; HON. BARBARA A. CURRAN, J.S.C.; HON. MAHLON L. FAST, J.S.C.

September 1, 2009, Submitted Pursuant to
Third Circuit LAR 34.1(a)
November 27, 2009, Opinion Filed

On Appeal from the United States District Court for the District of New Jersey. (D.C. Civil Action No. 07-cv-05579).

COUNSEL: ELEANOR CAPOGROSSO, Plaintiff - Appellant, Pro se, New York, NY.

For ADVISORY COMMITTEE ON JUDICIAL CONDUCT, PETER F. BARISO, BARBARA A. CURRAN, MAHLON L. FAST, MAURICE

GALLIPOLI, CANDACE MOODY, STUART RABNER, SUPREME CT OF NJ, JOHN TONTELLI, Defendants - Appellees: Virginia N. Langfitt, Esq., Office of Attorney General of New Jersey, Trenton, NJ; Matthew S. Sapienza, Esq., Office of Attorney General of New Jersey, Department of Law and Public Safety, Trenton, NJ.

JUDGES: Before: RENDELL, FUENTES and ALDISERT, Circuit Judges.

OPINION

PER CURIAM

Pro se appellant Eleanor Capogrosso, an attorney, filed a civil rights action against, *inter alia*, four New Jersey Superior Court judges, the New Jersey Advisory Committee on Judicial Conduct ("ACJC"), ACJC Disciplinary Counsel Candace Moody, and ACJC Director John Tonelli. Her claims stemmed from alleged judicial misconduct in her state court cases and alleged misconduct on the part of the ACJC, which is charged under the New Jersey Rules of Court with investigating claims of judicial misconduct. Capogrosso appeals from the District Court decision dismissing her 42 U.S.C. § 1983 complaint under Federal Rule of Civil Procedure 12(b)(6). We have jurisdiction pursuant to 28 U.S.C. § 1291.

I

Since around 2001, Capogrosso has been involved as a litigant in various state court lawsuits related to tenancy disputes. During the course of these cases,

Capogrosso appeared before Superior Court Judges Gallipoli, Fast, Curran, and Bariso. At some point in each case, the judges' judicial conduct appeared to Capogrosso as criminal or violative of her rights as a litigant. Following each incident, she filed a complaint with the ACJC. The ACJC dismissed all five complaints.

In November 2007, Capogrosso filed a 21-claim complaint in the District Court. Five of those claims alleged that the Superior Court judges' conduct on the bench amounted to criminal behavior. Capogrosso also raised claims, citing both the Fourteenth Amendment and 42 U.S.C. § 1983, that the ACJC violated her rights by dismissing her complaints against the judges. Based on these alleged violations, Capogrosso raised five claims for costs and attorney's fees. Further, Capogrosso claimed that New Jersey Court Rule 2:15, which established the ACJC, violates the New Jersey Constitution.

Capogrosso also alleged that, during the pendency of her federal case, another incident involving Judge Fast occurred. While in Superior Court, Capogrosso was waiting with her attorney outside of Judge Fast's chambers. Judge Fast exited his chambers, saw Capogrosso with her attorney, and entered the chambers of Superior Court Judge Iglesias, before whom Capogrosso was about to appear as a litigant. When she appeared before Judge Iglesias, he denied a motion her attorney had filed, although her lawyer commented to her that such motions were routinely granted. Capogrosso amended her federal complaint to allege that Judge Iglesias' surprising ruling, viewed in light of his interaction with Judge Fast before

Capogrosso's court appearance, gave rise to an inference of improper influence, in violation of her due process rights.

The Defendant-Appellees filed a Rule 12(b)(6) motion to dismiss, which the District Court granted. Capogrosso's motion for reconsideration was denied and she filed a timely notice of appeal.[1]

II

We exercise plenary review over the District Court order granting the Rule 12(b)(6) motion. *See McGovern v. Philadelphia*, 554 F.3d 114, 115 (3d Cir. 2009). "We accept all well-pleaded allegations in the complaint as true and draw all reasonable inferences in [Capogrosso's] favor." *Id.* "The District Court's judgment is proper only if, accepting all factual allegations as true and construing the complaint in the light most favorable to [Capogrosso], we determine that [she] is not entitled to relief under any reasonable reading of the complaint." *Id.*

The District Court dismissed Capogrosso's criminal claims against the Superior Court judges under the doctrine of judicial immunity. "A judicial officer in the performance of his duties has absolute immunity from suit and will not be liable for his judicial acts." *Azubuko v. Royal*, 443 F.3d 302, 303 (3d Cir. 2006). "A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted 'in the clear absence of all jurisdiction.'" *Id.* (quoting *Stump v. Sparkman*, 435 U.S. 349, 356-57, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978)).

Here, the District Court reasoned that all of the allegations against Judges Gallipoli, Bariso, Fast, and Curran related to actions they took as judges. We agree and note that despite her unsupported assertions to the contrary, Capogrosso has not set forth any facts that would show that any of the judges acted in the absence of jurisdiction. Likewise, the District Court correctly noted that Capogrosso's criminal claims fail to state a cause of action under § 1983, as individual citizens do not have a constitutional right to the prosecution of alleged criminals. *See Sattler v. Johnson*, 857 F.2d 224, 227 (4th Cir. 1988).

We also agree that Capogrosso failed to state a § 1983 claim for Judge Fast's alleged improper influence. The Federal Rules of Civil Procedure require that a plaintiff assert more than mere labels and conclusions. *See* Fed. R. Civ. P. 8; *Phillips v. County of Allegheny*, 515 F.3d 224, 231-32 (3d Cir. 2008). "[A] complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, U.S. , 129 S.Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). Thus, a "judicial conspiracy" claim must include at least a discernible factual basis to survive a Rule 12(b)(6) dismissal. *See Crabtree v. Muchmore*, 904 F.2d 1475, 1480-81 (10th Cir. 1990). To wit:

> The Court is mindful that direct evidence of a conspiracy is rarely available and that the

> existence of a conspiracy must usually be inferred from the circumstances. The Court is equally mindful that caution is advised in any pre-trial disposition of conspiracy allegations in civil rights actions.
>
> However, the rule is clear that allegations of a conspiracy must provide some factual basis to support the existence of the elements of a conspiracy: agreement and concerted action. A conspiracy cannot be found from allegations of judicial error, ex parte communications (the manner of occurrence and substance of which are not alleged) or adverse rulings absent specific facts demonstrating an agreement to commit the alleged improper actions.

Id. at 1481 (internal citations and quotation marks omitted). Here, Capogrosso alleged only that Judge Fast interacted with Judge Iglesias after presumably hearing her discuss her case in a hallway, and that Judge Iglesias' subsequent adverse ruling gives rise to an inference of conspiratorial conduct. The District Court reasoned that, without more, Capogrosso failed to state a cognizable claim under § 1983. We agree.

III

We turn next to Capogrosso's claims against the ACJC, Disciplinary Counsel Moody, and Director Tonelli (collectively, "ACJC").[2] At the outset, we note our agreement with the District Court's analysis concerning the overlap between Capogrosso's § 1983 claims against ACJC and her identical Fourteenth Amendment claims. Inasmuch as § 1983 affords a

remedy for infringement of one's constitutional rights, identical claims raised under the Fourteenth Amendment are redundant, rendering the outcome of the § 1983 claims dispositive of the independent constitutional claims. *See Rogin v. Bensalem Twp.*, 616 F.2d 680, 686-87 (3d Cir. 1980).

In dismissing Capogrosso's claims against the ACJC, the District Court reasoned that the entity and its employees are entitled to Eleventh Amendment immunity. The Eleventh Amendment to the United States Constitution protects an unconsenting state or state agency from a suit brought in federal court, regardless of the relief sought. *See MCI Telecomm. Corp. v. Bell Atl. Pennsylvania*, 271 F.3d 491, 503 (3d Cir. 2001). This immunity does not extend to individual state officers sued in their individual capacities for prospective injunctive or declaratory relief to remedy ongoing violations of federal law. *See id.* Inasmuch as Capogrosso sought relief against the ACJC and its employees only in their official capacities, dismissal of her claims was appropriate. *See Hirsh v. Justices of Sup. Ct. of California*, 67 F.3d 708, 715 (9th Cir. 1995). To the extent that Capogrosso's *pro se* complaint can be read to include claims against Director Tonelli and Disciplinary Counsel Moody in their individual capacities, they are entitled to quasi-judicial immunity and thus not subject to suit for injunctive relief. *See id.* Thus we agree with the District Court's dismissal of Capogrosso's § 1983 and Fourteenth Amendment claims. Accordingly, the District Court properly dismissed Capogrosso's five claims for attorney's fees and costs based on the alleged constitutional violations.

IV

Lastly, we address Capogrosso's claim that New Jersey Court Rule 2:15 violates the New Jersey Constitution. In dismissing that claim, the District Court reasoned that Capogrosso failed to state a claim cognizable under § 1983, as that provision only provides remedies for a deprivation of a person's "rights, privileges or immunities secured by the Constitution or laws of the United States." 42 U.S.C. § 1983; *see Kost v. Kozakiewicz*, 1 F.3d 176, 184 (3d Cir. 1993) (quoting *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981)).[3] We agree.

The District Court further reasoned that even if Capogrosso had raised a claim under the United States Constitution, the claim would still be dismissed because her bare allegation that the ACJC's confidential procedures facilitate improper decisions failed for the same reason as her "judicial conspiracy" claim. That is, her mere labeling of the ACJC's practices as unconstitutional, without greater factual support, was insufficient to support a claim for relief under § 1983. Again, we agree.

Accordingly, and for the foregoing reasons, we will affirm the judgment of the District Court. The Appellees' motion to file a supplemental appendix and to supplement the record is denied. Appellant's motion for leave to file a supplemental appendix is denied. Appellant's motion for leave to file a reply brief out of time and to file an overlength reply brief is granted. Appellant's motion for a protective order and for an expedited decision is denied. *See* Fed. R. App. P. 8(a);

3d Cir. L.A.R. 4.1. Appellant's motion for oral argument is denied.

Footnotes

1In her notice of appeal, Capogrosso states that she appeals all unfavorable orders related to the dismissal of her complaint. Because Capogrosso is an experienced litigant, we limit our consideration to the arguments raised in her appellate brief. Nevertheless, we remain mindful of our obligation to construe a *pro se* litigant's pleadings liberally. *See Haines v. Kerner*, 404 U.S. 519, 520-21, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972).

2Notably, Capogrosso sued Director Tonelli and Disciplinary Counsel Moody in their official capacities.

3Inasmuch as Capogrosso invoked the District Court's supplemental jurisdiction over a related state law claim, we understand the District Court to have declined to exercise it. *See* 28 U.S.C. § 1367(c)

Civ. Docket No. 07-5579 (FSH)
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

ELEANOR CAPOGROSSO, Plaintiff,

v.

SUPREME COURT OF NEW JERSEY, et al., Defendants.

August 6, 2008, Decided
August 6, 2008, Filed

NOTICE: NOT FOR PUBLICATION

HON. FAITH S. HOCHBERG, U.S.D.J.

OPINION & ORDER

This matter is before the Court upon Defendant's Motion to dismiss all counts pursuant to Federal Rule of Civil Procedure 12(b)(6). The Court has jurisdiction over Plaintiff's Complaint pursuant to 28 U.S.C. § 1331. The Court has reviewed the motion on the papers pursuant to Federal Rule of Civil Procedure 78.

I. FACTS

Plaintiff is an attorney appearing pro se in this matter. Plaintiff asserts twenty-two § 1983 claims arising out of five judgments against her in five different cases in New Jersey Superior Court from 2003 to 2007. Plaintiff brings six of her twenty-two claims against the individual judges before whom she appeared. [1] After

each of the five adverse decisions recited in Plaintiff's Complaint, Plaintiff filed a complaint against the presiding judge with the New Jersey Advisory Committee of Judicial Conduct ("ACJC"). All of these complaints were dismissed by the ACJC. Based on the ACJC's dismissal of Plaintiff's complaints, Plaintiff also asserts § 1983 claims against the ACJC for allegedly violating her Due Process rights under the United States Constitution. [2] In Claim Twenty-Two, Plaintiff brings a facial challenge to New Jersey Court Rule 2:15, which establishes the ACJC as a committee of the New Jersey Supreme Court. Finally, Plaintiff brings five Claims seeking attorney's fees arising from the wrongdoing alleged in the complaint. [3]

II. STANDARD

To survive a Rule 12(b)(6) Motion to Dismiss, "factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1965, 167 L. Ed. 2d 929 (2007). However, a court need not credit a complaint's "bald assertions" or "legal conclusions". *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997); see also *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1429-30 (3d Cir. 1997). As the Third Circuit has explained "a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, [however] a plaintiff's . . . obligation to provide the 'grounds' of his 'entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Phillips v. County of Allegheny*, 515 F.3d

224, 231 (3d Cir. 2008) (quoting *Twombly*, 127 S.Ct. at 1964-65). In evaluating a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the Court may consider only the Complaint, exhibits attached to the Complaint, matters of public record, and undisputedly authentic documents if the Plaintiff's claims are based on those documents. *Pension Guar. Corp. v. White Consol. Indus.*, 998 F.2d 1192, 1196 (3d Cir. 1993).

III. ANALYSIS

A. Criminal Claims

Plaintiff's complaint contains five claims against individual judges of the New Jersey Superior Court, in which Plaintiff alleges that the judges committed various criminal offenses. Plaintiff claims Judge Gallipoli committed perjury in the course of two different cases (Claims Four and Eight), Judge Curran facilitated the commission of a crime (Claim Twelve), Judge Bariso committed extortion (Claim Sixteen), and Judge Fast committed perjury (Claim Twenty).

The Court dismisses the claims brought against Judges Gallipoli, Curren, Bariso, and Fast under the doctrine of judicial immunity. Judges acting in their judicial capacity are absolutely immune from suit in their individual and official capacities. *Carroway v. New Jersey*, No. 06-0614, 2006 U.S. Dist. LEXIS 30120, 2006 WL 1373153, at *4 (D.N.J. May 17, 2006) (citing *Mireles v. Waco*, 502 U.S. 9, 112 S. Ct. 286, 116 L. Ed. 2d 9 (1991)). "Judicial immunity is an immunity from suit, not just from ultimate assessment of damages." *Mireles*, 502 U.S. at 11. "[J]udicial immunity can be overcome only for actions not taken in a judicial capacity, or for

actions taken in a complete absence of all jurisdiction." *Carroway*, 2006 U.S. Dist. LEXIS 30120, 2006 WL 1373153, at *4 (citing *Mireles*, 502 U.S. at 11-12); see also *Gallas v. Supreme Court of Penn.*, 211 F.3d 760, 768-69 (3d Cir. 2000) ("the factors determining whether an act by a judge is a 'judicial' one relate to the nature of the act itself, i.e., whether it is a function normally performed by a judge, and to the expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity." (quoting *Stump v. Sparkman*, 435 U.S. 349, 362, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978)). Further, "[a]llegations that actions were undertaken with an improper motive diminishes neither their character as judicial actions nor the judge's immunity." *Carroway*, 2006 U.S. Dist. LEXIS 30120, 2006 WL 1373153, at *4 (citing *Forrester v. White*, 484 U.S. 219, 227, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988)). Claims Four, Eight, Twelve, Sixteen, and Twenty arise from decisions the individual judges made on the bench, which are actions taken in the judges' judicial capacity even if they were erroneous or improper. Cf. *Curley v. Lawrence*, 24 Fed. App'x 66, 67 (2d Cir. 2001) ("Plaintiff's claims . . . are based upon orders that [the judge] issued from the bench while presiding over a matter. . . .Such orders qualify as judicial acts."); *Johns v. Isman*, No. 07-5909, 2008 U.S. Dist. LEXIS 15636, 2008 WL 619148, *3 (D.N.J. Feb. 29, 2008). For this reason, the Court will dismiss claims Four, Eight, Twelve, Sixteen, and Twenty. [4]

B. Section 1983 Claims

"Section 1983 provides remedies for deprivations of rights established by the Constitution, including' . . . due process under the Fourteenth Amendment." *Chainey v.*

Street, 523 F.3d 200, 219 (3d Cir. 2008). In order to sustain a § 1983 claim, "the Plaintiff must prove the following two essential elements: (1) that the conduct complained of was committed by a person acting under color of state law; and (2) that the conduct complained of deprived the Plaintiff of rights, privileges or immunities secured by the law or the Constitution of the United States." *Williams v. Marino*, No. 08-792, 2008 U.S. Dist. LEXIS 42904, 2008 WL 2247090, at *4 (M.D. Pa. May 30, 2008) (citing *Parratt v. Taylor*, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981); *Kost v. Kozakiewicz*, 1 F.3d 176, 184 (3d Cir. 1993)).

The Eleventh Amendment states that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. Although the Eleventh Amendment does not explicitly bar suits against a state by its own citizens, the Supreme Court has held that a state is also immune from suits brought by its own citizens. See *Edelman v. Jordan*, 415 U.S. 651, 662-63, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974). Although the Eleventh Amendment only refers to actions "against one of the United States," "[i]t has long been settled that the [Amendment] encompasses not only actions in which a State is actually named as the defendant, but also certain actions against state agents and state instrumentalities." *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429, 117 S. Ct. 900, 137 L. Ed. 2d 55 (1997). "As a general proposition, a suit by private parties seeking to impose a liability which must be paid from public funds in a state treasury is barred from federal court by the Eleventh Amendment, unless

Eleventh Amendment immunity is waived by the state itself or by federal statute." [5] *Carroway*, 2006 U.S. Dist. LEXIS 30120, 2006 WL 1373153, at *3 (citing Edelman, 415 U.S. at 663). In enacting § 1983, Congress did not abrogate states' Eleventh Amendment immunity. See *Quern v. Jordan*, 440 U.S. 332, 342, 99 S. Ct. 1139, 59 L. Ed. 2d 358 (1979).

Plaintiff alleges that the ACJC, ACJC Disciplinary Counsel Candace Moody, and ACJC Director John Tonelli violated her Due Process rights under the Fourteenth Amendment by dismissing her complaints against the four judges of New Jersey Superior Court. Plaintiff's claims against John Tonelli and Candace Moody are brought against them in their official capacities. Am. Compl. ¶¶ 5, 7, 8. In Claims Two, Six, Ten, Fourteen and Eighteen, Plaintiff alleges that by improperly dismissing her complaints, the ACJC Defendants "acted outside the color of state law in violation of 42 U.S.C. [§] 1983." [6] Am. Compl. ¶¶ 58, 176, 245, 318, 365.

A court in this district has found that the ACJC and members of the ACJC sued in their official capacities are entitled to Eleventh Amendment immunity. See *Hunter v. Supreme Court*, 951 F. Supp. 1161, 1177-78 (D.N.J. 1996) ("The ACJC is also entitled to Eleventh Amendment immunity."), aff'd, 118 F.3d 1575 (3d Cir. 1997); see also, e.g., *Joynes v. Meconi*, 2006 U.S. Dist. LEXIS 71296, 2006 WL 2819762, at *5 (D. Del. 2006) (relying on Hunter and finding that an ad hoc committee of the state supreme court was entitled to Eleventh Amendment immunity); *Gencarelli v. Superior Court of N.J.*, No. 04-3332, 2005 U.S. Dist. LEXIS 42264, 2005 WL 1490590, at *3 (D.N.J. June 21,

2005) (citing Hunter and finding that county probations offices are entitled to Eleventh Amendment immunity as judicial employees funded by the state); *Johnson v. New Jersey*, 869 F. Supp. 289, 296 (D.N.J. 1994) ("[T]he Court finds that the Administrative Office of the Courts can cloak itself in the state's sovereign immunity under the Eleventh Amendment."). In Hunter the court noted the Third Circuit's instruction that "although no single . . . factor is dispositive [to determining Eleventh Amendment immunity], the most important is whether any judgment would be paid from the state treasury." *Hunter*, 951 F. Supp. at 1177 (quoting *Fitchik v. N.J. Transit Rail Operations, Inc.*, 873 F.2d 655, 659 (3d Cir.) (en banc), cert. denied, 493 U.S. 850, 110 S. Ct. 148, 107 L. Ed. 2d 107 (1989)). The court then concluded that the ACJC and its members in their official capacity are entitled to Eleventh Amendment immunity "[b]ecause the ACJC is a committee of the Supreme Court, [and] the State of New Jersey would be responsible for any damage award against the ACJC." *Hunter*, 951 F. Supp. at 1177, 1178. Because the ACJC and members of the ACJC in their official capacities are entitled to Eleventh Amendment Immunity, the Court will grant Defendants' motion to dismiss claims Two, Three, Six, Seven, Ten, Eleven, Fourteen, Fifteen, Eighteen and Nineteen.

In Claim Twenty-Two, Plaintiff alleges that Judge Fast improperly influenced Judge Iglesias in violation of Plaintiff's Due Process rights under the Fourteenth Amendment. Plaintiff alleges that her attorney saw Judge Fast enter Judge Iglesias' chambers prior to Plaintiff's appearance before Judge Iglesias, and that Judge Iglesias' subsequent decision against Plaintiff gives rise to an implication that Judge Fast improperly

"exert[ed] his influence on Judge Iglesias' decision." Am. Compl. ¶432.

Plaintiff's conclusory allegations fail to state a § 1983 claim against Judge Fast. Plaintiff asks the Court to infer Judge Fast's allegedly improper conduct based only on Judge Iglesias' unfavorable decision. As the Tenth Circuit has held, however, "[a] conspiracy cannot be found from allegations of judicial error, ex parte communications (the manner of occurrence and the substance of which were not alleged) or adverse rulings absent specific facts demonstrating an agreement to commit the alleged improper actions." *Crabtree v. Muchmore*, 904 F.2d 1475, 1481 (10th Cir. 1990). Plaintiff's allegation of an otherwise innocuous meeting between colleagues is an insufficient statement of a § 1983 claim. See *Phillips*, 515 F.3d at 231 ("[A] complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, [however] a plaintiff's . . . obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." (quoting *Twombly*, 127 S.Ct. at 1964-65)).

Relatedly, it is clear that the basis for Plaintiff's claim is her disagreement with Judge Iglesias' decision in her case, an act for which Judge Iglesias is immune. See *Carroway*, 2006 U.S. Dist. LEXIS 30120, 2006 WL 1373153, at *3 (citing *Mireles v. Waco*, 502 U.S. 9, 112 S. Ct. 286, 116 L. Ed. 2d 9 (1991)). "Plaintiff . . . cannot overcome judicial immunity by making conclusory allegations of a conspiracy by judges and claiming the need for discovery to prove such bald allegations." *Schwartz v. Snohomish County*, No. 05-732, 2006 U.S.

Dist. LEXIS 15065, 2006 WL 692024, at *5 (W.D. Wash. March 17, 2006); see also *Mireles*, 502 U.S. at 11 ("[J]udicial immunity is not overcome by allegations of bad faith or malice, the existence of which ordinarily cannot be resolved without engaging in discovery and eventual trial."). Permitting the Plaintiff's § 1983 claim to proceed would provide Plaintiff with a means to circumvent judicial immunity. Because Plaintiff has failed to state a § 1983 claim against Judge Fast in Claim Twenty-Two, the Court will grant Defendants' motion to dismiss that claim.

C. Facial challenge to N.J. CT. R. 2:15

In Claim One, Plaintiff challenges New Jersey Court Rule § 2:15. Plaintiff alleges that the New Jersey Supreme Court has "given unbridled discretion to the Advisory Committee of Judicial Conduct to determine which allegations of a complaint are without merit and dismiss them", Am. Compl. ¶ 21, in violation of the New Jersey state constitution. See Am. Comp. ¶¶ 21-24 (The "Supreme Court has abrogated its constitutional responsibility [under Article 6, Sec. 2 of the New Jersey constitution] by giving a constitutional obligation to an organization that is not subject to review or oversight."). Plaintiff seeks declaratory relief that New Jersey Court Rule § 2:15 is unconstitutional under the New Jersey constitution and that complaints to the ACJC should be made public. Am. Compl. at 57 ¶ 3.

Plaintiff's Complaint states that each of her claims is brought under § 1983, see Am. Compl. P 13 ("This action is being brought pursuant to 42 U.S.C. Sec. 1983. . . ."), and she asserts that this Court has federal question jurisdiction over each of her claims, see id. ¶¶

1 ("The jurisdiction of this Court is based upon 28 U.S.C. § 1331."). To the extent Plaintiff's facial challenge to New Jersey Court Rule 2:15 is brought under § 1983, her claim must fail because it does not allege a deprivation of a "right[], privilege[] or immunit[y] secured by the law or the Constitution of the United States." *Williams*, 2008 U.S. Dist. LEXIS 42904, 2008 WL 2247090, at *4. Rather, Plaintiff's complaint alleges only that New Jersey Court Rule 2:15 amounts to an "abrogation" of the New Jersey Supreme Court's duty under the New Jersey state constitution. "[A] claimed violation of a state constitutional right is not cognizable under § 1983." [7] *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 314 (6th Cir. 2005) (collecting cases). Because Claim One is not cognizable in a § 1983 claim, the Court will grant Defendants' motion to dismiss that claim. [8]

IV. ORDER

ACCORDINGLY it is this 6th day of August, 2008, hereby

ORDERED that Defendants' motion to dismiss Plaintiff's complaint against the New Jersey Supreme Court, Stuart Rabner (as Chief Justice of the New Jersey Supreme Court), the New Jersey Advisory Committee on Judicial Conduct, Candace Moody in her official capacity (as Disciplinary Council to the ACJC), John Tonelli in his official capacity (as the Director of the ACJC), Hon. Maurice J. Gallipoli, Hon. Peter F. Bariso, Hon. Barbara A. Curran, and Hon. Mahlon L. Fast is GRANTED and the complaint dismissed in its entirety; and it is further

ORDERED that this case is CLOSED.

/s/ Faith S. Hochberg

HON. FAITH S. HOCHBERG, U.S.D.J.

Footnotes

1 The following claims are against judges of the New Jersey Superior Court: Count Four (Judge Gallipoli for perjury); Count Eight (Judge Gallopoli for perjury); Count Twelve (Judge Curran for facilitation of a crime); Count Sixteen (Judge Bariso for extortion); Count Twenty (Judge Fast for perjury); Count Twenty-Two (Judge Fast for interference with Plaintiff's right to Due Process).

2 In Claims Two, Six, Ten, Fourteen and Eighteen, Plaintiff alleges that by improperly dismissing her complaints against the judges, the ACJC "acted outside the color of state law in violation of 42 U.S.C. [§] 1983." Amended Complaint ("Am. Compl.") ¶¶ 58, 176, 245, 318, 365. In Claims Three, Seven, Eleven, Fifteen and Nineteen, Plaintiff claims that the ACJC's decisions to dismiss her complaints "w[ere] arbitrary and capricious in violation of the Fourteenth Amendment of the United States Constitution." Id. at ¶¶ 92, 194, 263, 332, 374. "[P]laintiff's . . . claim[s] seeking relief directly under the Fourteenth Amendment, if meritorious, 'can be sufficiently vindicated by an action under 42 U.S.C. § 1983 and there is no need or right to assert a cause of action directly under the Constitution.' Thus, the Court's decision on [P]laintiff's claims in Counts [Two, Six, Ten, Fourteen and Eighteen] will be dispositive of [P]laintiff's [claims in] Count[s Three, Seven, Eleven,

Fifteen and Nineteen]." *Moiles v. Marple Newtown School Dist.*, No. 01-4526, 2002 U.S. Dist. LEXIS 15769, 2002 WL 1964393, at *3 (E.D. Pa. August 23, 2002).

3 In Claims Five, Nine, Thirteen, Seventeen, and Twenty-One Plaintiff seeks attorneys' fees that she incurred as a result of the wrongdoing alleged in Claims Two, Three, Four, Six, Seven, Eight, Ten, Eleven, Twelve, Fourteen, Fifteen, Sixteen, Eighteen, Nineteen, and Twenty.

4 It is also well settled that an individual cannot compel enforcement of federal or state criminal law in a federal district court. See *Linda R.S. v. Richard D.*, 410 U.S. 614, 619, 93 S. Ct. 1146, 35 L. Ed. 2d 536 (1973) ("[I]n American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."); see also *Diamond v. Charles*, 476 U.S. 54, 64, 106 S. Ct. 1697, 90 L. Ed. 2d 48 (1986) (same); *New York v. Hendrickson Bros., Inc.*, 840 F.2d 1065, 1086 (2d Cir. 1988) (noting that "federal courts have no jurisdiction to enforce the criminal laws of the states"); *Soder v. Chenot*, No. 06-1522, 2007 U.S. Dist. LEXIS 93657, 2007 WL 4556670, at *6 (M.D. Pa. Dec. 20, 2007) ("Obviously . . . a private individual plaintiff cannot enforce state criminal laws . . . in this civil action before a federal court."). Consequently, an alleged criminal violation is not a proper basis for a § 1983 claim. See, e.g., *Sattler v. Johnson*, 857 F.2d 224, 227 (4th Cir. 1988) ("At argument, [plaintiff's] counsel suggested that [plaintiff] had an enforceable right as a member of the public at large and as a victim to have the defendants criminally prosecuted. He further urged that such a right was protected by the equal protection clause of the fourteenth amendment. There is, of

course, no such constitutional right. . . ."); *Soder*, 2007 U.S. Dist. LEXIS 93657, 2007 WL 4556670, at *6 ("[Plaintiff]'s references to state-law torts and criminal statutes do not provide the basis for a proper § 1983 claim."); *Thomas v. U.S. Bureau of Prisons*, No. 06-063, 2007 U.S. Dist. LEXIS 70172, 2007 WL 2788650, at *11 (D. Colo. Sept. 21, 2007) (noting that "[n]either do the federal or state criminal statutes cited by Mr. Thomas provide for a private cause of action" and dismissing § 1983 claim based upon alleged criminal violation).

5 There is an exception to Eleventh Amendment immunity when Plaintiff seeks prospective injunctive or declaratory relief for an ongoing violation of federal law, rather than monetary damages. See *Ex Parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908). The *Ex Parte Young* exception is not applicable to Plaintiff's actions for retrospective damages.

6 For the reasons stated in footnote 2, supra, these claims are identical to Claims Three, Seven, Eleven, Fifteen and Nineteen and the Court's analysis of Claims Two, Six, Ten, Fourteen and Eighteen also applies to those claims.

7 For the first time in her opposition brief, Plaintiff suggests that Claim One of her Complaint alleges a violation of her federal constitutional right to Due Process under the Fourteenth Amendment. Although elsewhere in Plaintiff's complaint she specifically invokes the Fourteenth Amendment, she does not do so in Claim One. Plaintiff identifies the New Jersey constitution as the sole basis for her first claim. See Am. Compl. ¶¶ 15-24.

Nevertheless, even if Plaintiff's Complaint did allege a violation of her Due Process rights under the Fourteenth Amendment, the Court would still dismiss Claim One. Plaintiff provides no case law to support her assertion that the New Jersey Supreme Court's delegation of administrative responsibilities to the AJCJ under New Jersey Court Rule 2:15 violates her Due Process rights under the United States Constitution. Nor does Plaintiff provide any basis for her allegation that the ACJC "shrouds the deliberative process under a veil of secrecy which enables capricious and ad hoc decision making", see Opp. at 11, other than her disagreement with the outcome of her complaints. This an insufficient basis upon which to premise an § 1983 claim. See *Phillips*, 515 F.3d at 231 ("[A] complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, [however] a plaintiff's . . . obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." (quoting *Twombly*, 127 S.Ct. at 1964-65)).

8 Because the Court has granted Defendants' motion to dismiss each of Plaintiff's substantive claims, the Court will also dismiss Plaintiff's claims for attorney's fees - Claims Five, Nine, Thirteen, Seventeen, and Twenty-One.

Filed 3/12/2010
No. 08-3816
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ELEANOR CAPOGROSSO, Appellant
v.
THE SUPREME COURT OF THE STATE OF NEW JERSEY; STUART RABNER (INTENDED TO BE THE CHIEF JUDGE OF THE SUPREME COURT OF NEW JERSEY); ADVISORY COMMITTEE ON JUDICIAL CONDUCT; CANDACE MOODY (INTENDED TO BE THE DISCIPLINARY COUNSEL FOR THE ADVISORY COMMITTEE ON JUDICIAL CONDUCT); JOHN TONELLI (INTENDED TO BE THE DIRECTOR OF THE ADVISORY COMMITTEE ON JUDICIAL CONDUCT); HON. MAURICE J. GALLIPOLI, J.S.C.; HON. PETER F. BARISO, J.S.C.; HON. BARBARA A. CURRAN, J.S.C.; HON. MAHLON L. FAST, J.S.C.

SUR PETITION FOR REHEARING EN BANC

Present: SCIRICA, Chief Judge, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY and ALDISERT, Circuit Judges*

The Petition for Rehearing filed by the Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not

having voted for rehearing, the Petition for Rehearing by the panel and the Court en banc, is hereby DENIED.

BY THE COURT,
/s/ Julio M. Fuentes
Circuit Judge